No. 86-768 (3)

In The
Supreme Court of the United States
October Term, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY MISSOURI PACIFIC RAILROAD COMPANY

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CERTIFICATE

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The following are the parties to the suit requested to be listed under Rule 28.1.

1. Mr. Albert Wayne Cox.
2. Mr. Michael G. Cade.
3. Missouri Pacific Railroad Company.
4. Union Pacific Railroad Company.

5. Kansas City Southern Industries, Inc. (parent).

6. The Kansas City Northern Railway Company.

7. The Kansas City Southern Railway Company.

8. Louisiana & Arkansas Railway Company.

9. The American-Coleman Company.

10. American-Coleman International Corp.

11. The Arkansas Western Railway Company.

12. Boston Financial Data Services, Inc.

13. Carland, Inc.

14. Cybertech, Inc.

15. DST, Inc.

16. DST Clearing, Inc.

17. DST-Computer-Services, S.A.

18. DST Securities, Inc.

19. Fort Smith and Van Buren Railway Company.

20. Investors Fiduciary Trust Company.

21. Joplin Union Depot Company.

22. The Kansas and Missouri Railway and Terminal Company.

23. Kansas City Southern Transport Company, Inc.

24. Kansas City Terminal Railway Company.

25. Landa Motor Lines.

26. Lonestar-KC Concrete Tie Company.

27. Louisiana, Arkansas & Texas Transportation Company.

28. The Maywood and Sugar Creek Railway Company.

29. Midwestern Minerals, Inc.

30. Mid-America Television Company.

31. Northern Properties Corporation.

32. Pabtex, Inc.

33. Pioneer Western Corporation.

34. Pioneer Western Energy Corporation.

35. Pioneer Western Financial Corporation.

36. Pioneer Western Financial Planning Corporation.

37. Pioneer Western Management, Inc.

38. Pioneer Western Marketing Corporation.

39. Reserve Realty.

40. Rice-Carden Corporation.

41. Rycom Instruments, Inc.

42. Southern Development Company.

43. Supporet Systems, Inc.

44. Tolmak, Inc.

45. Trans Serve, Inc.

46. Veals, Inc.

47. Wall Street Clearing Company.

48. Western Reserve Financial Services Corp.

49. Western Reserve Life Assurance Co. of Ohio.

50. The Western Pacific Railroad Company

Union Pacific Corporation
Pacific Rail System, Inc.
Missouri Pacific Corporation
UP Sub, Inc.
Pacific Subsidiary, Inc.
Champlin Alaska Pipeline, Inc.
Champlin Gas Gathering, Inc.
Champlin Marketing, Inc.
Champlin Refining, Inc.
American Refrigerator Transit Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railroad
Missouri Improvement Company
MP Redevelopment Corporation
Park Spring, Inc.
Stonegate Park, Inc.
Jefferson Southwestern Railroad Company
Southern Illinois and Missouri Bridge Company
The Alton & Southern Railway Company
MP Equipment Corporation
Missouri Pacific Truck Lines, Inc.
Brownsville & Matamoros Bridge Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Intermodal Transport, Inc.
Texas & Missouri Pacific Railroad Company
The Weatherford Mineral Wells and Northwestern Railway Company
Galveston, Houston and Henderson Railway Company
Houston Belt & Terminal Railway Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
The Belt Railway of Chicago
Penn Central Corporation
The Pueblco Union Depot and Railroad Company
Chicago & Western Indiana Railroad Company

Texas City Terminal Railway Company
Terminal Industrial Land Company
Great Southwest Railroad, Inc.
Wasatch Insurance Limited
UP Leasing Corporation
Union Pacific Finance N.V.
Union Pacific Foundation
Champlin Petroleum Company
Calnev Pipe Line Company
Champlin Gas Processing Company
Champlin Liquid Pipeline, Inc.
MKT Exploration Company
Champlin International Petroleum Company
Wamsutter Pipeline, Inc.
Champlin Petrochemicals, Inc.
CMT Ltd.
Champlin Pipeline, Inc.
Nueces Pipeline, Inc.
Harbor Service Stations, Inc.
Union Pacific Resources Corporation
Upland Industries Corporation
Unita Development Company
Union Pacific Land Resources Corporation
Upland Industrial Development Company
Quality Aggregate Company
Rocky Mountain Energy Company
Bitter Creek Coal Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Kanda Development Company
Prospect Point Coal Company
Rock Springs Royalty Company
Champlin Trading Company
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Arguello Pipeline, Inc.
Panola Pipe Line, Inc.
Esperanza Pipeline Company
Champlin Canada, Ltd.
Union Pacific Resources, Ltd.

Overthrust Pipe Line, Inc.
Champlin Gas Pipeline, Inc.
R M Leasing Company
Winton Coal Company
Stauffer Chemical Company of Wyoming
Oregon Short Line Railroad Company
Camas Prairie Railroad Company
Los Angeles & Salt Lake Railroad Company
Des Chutes Railroad Company
Yakima Valley Transportation Company
Oregon-Washington Railroad & Navigation Company
Mount Hood Railway Company
Union Pacific Fruit Express Company
Union Pacific Motor Freight Company
Union Pacific Freight Services Company
Spokane International Railroad Company
The St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
The Ogden Union Railway & Depot Company
Portland Traction Company
Oakland Terminal Railway
Alameda Belt Line
Tidewater Southern Railway Company
Standard Realty and Development Company
WPX Freight System, Inc.
Delta Finance Company, Ltd.
Sacramento Northern Railway
Denver Union Terminal Railway
Portland Terminal Railroad Company
Longview Switching Company
Central California Traction Company

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To the Honorable Supreme Court of the United States:

Your petitioner, Missouri Pacific Railroad Company, responds to the issues in Kansas City Southern's petition for writ of certiorari as follows:

REASONS FOR DENYING THE WRIT

KCS's petition for certiorari asks this court to review two ordinary procedural matters in this diversity case: (i) the district court's allocation of jury strikes and (ii) a charge concerning the necessity of operative air brakes on Missouri Pacific's train. We respond to those narrow, technical issues in the order presented:

1.

The jury's allocation of jury strikes was proper, but not harmful in any event.

The district court's allocation of jury strikes was a proper exercise of statutory discretion; nevertheless, no harm resulted therefrom.

a. The allocation as proper: The district court's decision to treat plaintiffs and defendants as "sides" and increase the number of strikes per "side" to four (First Suppl. Record, Stapled Addendum, pp. 2-3) is "**** expressly authorized by Section 1870, Title 28, *United States Code* ****". *Carey* v. *Lykes Brothers Steamship Co., Inc.*, 455 F.2d 1192, 1194 (5th Cir. 1972).

The district court's decision to employ its statutory authority was appropriate in light of the pleadings and adversity of the parties. At jury selection, the court was presented with two plaintiffs (represented by one attorney), one defendant (Kansas City Southern), and one third-party defendant (Missouri Pacific). Both plaintiffs were adverse to both defendants (i.e., to KCS on all issues and to Missouri Pacific on damages). Sides were thus

formed by the pleadings and the issues, thus positing the court's allocation of strikes well within the discretion permitted by § 1870. *Moore* v. *South African Marine Corporation, Ltd.*, 469 F.2d 280, 281 (5th Cir. 1972); *Fedorchick* v. *Massey-Ferguson, Inc.*, 577 F.2d 856, 858 (3rd Cir. 1978).

The allocation adopted by the court was not inimical to KCS's right to a fair and impartial jury so as to be an abuse of discretion. Both sides to the controversy had an equal number of strikes. Each party, considered separately, had an equal number of strikes as to each adverse party. The rule that has evolved out of comparable suits with similar party alignments is that:

> "*** the trial judge may require a defendant-third-party plaintiff and third-party defendants to share the same number of peremptory challenges as allocated to a single plaintiff. ***"

Fedorchick v. *Massey-Ferguson, Inc.*, supra, 577 F.2d 858; *Moore* v. *South African Marine Corporation, Ltd.*, supra, 469 F.2d 280, 281 (5th Cir. 1972); *Nehring v. Empresa Lineas Maritimas Argentinas*, 401 F.2d 767, 768 (5th Cir. 1968). In fact, the trial court allocated more strikes to KCS than the minimum allowed by the foregoing rule.

b. The allocation as harmless: No harm is shown from the district court's allocation of peremptory challenges, in any event.

Erroneous methods of allocating peremptory challenge are subject to the harmless error rule. Rule 61, *Fed. R. Civ. Proc.* KCS made no effort to demonstrate that "*** if a further peremptory challenge had been al-

lowed, ... [it] meant to challenge one or more jurors***". *Goldstein v. Kelleher,* 728 F.2d 32, 38 (1st Cir. 1983). In failing to meet that minimum requirement, KCS failed to establish harm from the denial of additional peremptory challenges. *Goldstein* v. *Kelleher,* supra; *Rogers* v. *De-Vries & Co.,* 236 F. Supp. 110 (D.C. Tex. 1964). KCS's complaint to the denial of a challenge for cause is subject to the doctrine of *de minimis non curat lex.* We defer to the discussion at pp. 5-6 of Cox's and Cade's brief in opposition.

2.

The charge on air brakes was harmless, if erroneous, and would not have resulted in a negligence per se submission under Texas law, in any event.

Although adorned with lofty constitutional trappings, the complaint to the charge, as disposed of by the court of appeals, involves nothing more than a question of fact in a cause of action governed by state law. This is not a substantial federal question, within the meaning of Rule 17, *Rules of the Supreme Court of the United States.* See *Rice* v. *Sioux City Cemetery,* 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955).

In context, the charge on air brakes was academic. More substantively, under Texas law, KCS could not have obtained a negligence *per se* submission from violation of the subject regulation, to wit:

a. The instruction as academic: First of all, as a matter of law, six non-operational power brakes on Missouri Pacific's train could not have caused the injuries in suit. Cox and Cade jumped from the train 400 ft. from the ultimate point of collision. (I Tr. 81.) The only effect six less power-braked cars had on the

operation of Missouri Pacific's train was to lengthen the emergency stop by 56 ft. (II Tr. 39-40.) However, Cox and Cade jumped from the train 400 ft. from the ultimate point of collision. (I Tr. 81.)

The jury determined that Cox's and Cade's decision to jump from the train at the time they did was reasonable. (R. 205.) There is no evidence that, at the time of their jump, Cox or Cade knew that their train had inoperable power brakes on six cars, if it did; there is no evidence that they jumped from fear of danger caused by inoperative power brakes. The court of appeals was correct in holding, under Texas law, that the unreasonable risk that caused Cox's and Cade's injuries was KCS blocking the crossing by reason of its negligent failure to follow its instructions for safely proceeding through a crossing. Alleged defects in MoPac's power brakes could not, as a matter of law, have had any causal effect upon the plaintiffs' emergency exit from the train (which caused their injuries) or upon KCS's negligent conduct in blocking the crossing. The giving of the questioned charge on air brakes, erroneous or not, was academic; in context, it could not affect the outcome. Compare: *East Texas Theatres, Inc.* v. *Rutledge,* 453 S.W.2d 466 (Tex. 1970); *Wohlford* v. *Texas & N. O. R. Co.,* 128 S.W.2d 449 (Tex. Civ. App., 1939, writ dism., judgm. cor.).

b. Inapplicability of negligence per se: The district court submitted operation of the train with inoperative brakes as a ground of ordinary negligence. (II Tr. 23.) The only harm claimed by KCS from the purportedly erroneous instruction is the denial of a negligence *per se* submission under Texas law. However, Texas

law would not recognize a regulation, such as 45 *C.F.R.*, § 232.1, as a proper basis for negligence *per se*.

Texas courts determine in each instance whether a penalty provision in a statute codifies a legitimate standard of care so that occurrence of the prohibited conduct can be said to be a breach of the standard *per se*. *Carter* v. *Wm. Sommerville & Son, Inc.*, 584 S.W.2d 274 (Tex. 1979). Texas courts thus do not permit a statutory pronouncement to stand as negligence *per se* "*** when the actor is unable after reasonable care or diligence to comply with the regulation ***". *Lawrence* v. *Hardy*, 583 S.W.2d 795, 800 (Tex. Civ. App., 1979, writ ref., n.r.e.).

KCS's interpretation of 45 *C.F.R.*, § 232.1, imposes an absolute duty where a power brake, in perfect operating order upon initial inspection, malfunctions while the train is in operation, without knowledge of the railroad, without circumstances indicating it should have known of the defect, and without the ability to correct it. In other words, KCS's application of the regulation would impose a form of guarantee or suretyship as to the nature of the railroad's equipment, divorced entirely from prudent conduct or the exercise of reasonable care.

Faced with that interpretation, Texas courts would reject the argument that 45 *C.F.R.*, § 232.1, codifies a type of conduct that represents an attainable standard of care. Instead, Texas courts would hold that, as interpreted by KCS, 45 *C.F.R.*, § 232.1, is "*** so far removed ***" from conduct that it does not provide an appropriate basis for negligence *per se* under Texas law, *Carter* v. *Wm. Sommerville & Son, Inc.*, supra, or that the regulation has such a unique administrative or regulatory purpose that it is

not "*** a standard by which civil liability is to be judged ***". *Continental Oil Co.* v. *Simpson*, 604 S.W.2d 530, 536 (Tex. Civ. App., 1980, writ ref., n.r.e.).

Since KCS obtained a submission asking whether operation of the train with inoperative brakes was ordinary negligence, it obtained all it could under Texas law.

WHEREFORE, PREMISES CONSIDERED, Missouri Pacific prays that the petition for certiorari be denied. It additionally prays for such other and further relief to which it may justly be entitled at law or in equity.

Respectfully submitted,

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